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U.S. Patent Application Serial No. 10/707,526

TECHNOLOGY CENTER 3700 PERSONNEL:

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THE FOLLOWING 29-PAGE DOCUMENT IS A

RESPONSE AFTER FINAL

including:

- ☐ Response under 37 CFR §1.116
- ☐ Notice of Appeal
- ☒ Appeal Brief under 37 CFR §41.37
- ☐ Reply Brief under 37 CFR §41.41
- ☐ Request for Continued Examination (RCE) Transmittal
- ☐ Other:

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Gary M. Hartman

November 7, 2005

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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. :	10/707,526	Confirmation No. 1525
Applicant :	Patrick C. Urschel et al.	
Filed:	December 19, 2003	
TC/Art Unit:	3724	
Examiner :	Stephen Choi	
Docket No. :	A3-1700	
Customer No. :	27127	

Commissioner for Patents
P.O. Box 1450
Alexandria VA 22313-1450

APPEAL BRIEF UNDER 37 CFR §41.37

This is an appeal from the Examiner's final rejection made in an Office Action dated June 6, 2005 (Paper No. 06012005), of claims pending in the above-identified US patent application. Please charge the requisite fee and any other necessary charges to Hartman & Hartman, P.C., Deposit Account No. 08-0960.

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REAL PARTY IN INTEREST

The real party in interest is Urschel Laboratories, the assignee of
record.

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RELATED APPEALS AND INTERFERENCES

There are no prior or pending appeals or interferences known to Appellants or Appellants' assignee or Appellants' representative that would directly affect or be directly affected by or have a bearing on this appeal regarding the above-identified patent application.

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STATUS OF CLAIMS

Claims 1-20 were originally presented in this application. Of these
claims:

Claims 1-20 are pending in the application;

Claims 2-5, 10-13, 15-17, 20 are withdrawn from consideration; and

Claims 1, 6-9, 14, 18, and 19 are rejected.

Claims 1, 6-9, 14, 18, and 19 are the subject of this appeal.

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STATUS OF AMENDMENTS

Following the final rejection, Appellants filed a response under 37
CFR §1.116, on September 6, 2005, without amendments to the claims.

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SUMMARY OF CLAIMED SUBJECT MATTER

For the convenience of the Board, each independent claim under appeal is reproduced below, with the reference numeral of each element as denoted in the specification and drawings set forth in parentheses.

Claim 1: A method of cutting food product, the method comprising the steps of:

providing a cutting means **(12,52,72)** comprising at least one cutting element **(34,53,55)** disposed in a cutting plane that is not vertical;

individually delivering food products to the cutting means **(12,52,72)** by causing the food products to free-fall through a feed passage **(14,54,74)** and then free-fall through the cutting means **(12,52,72)** entirely under the force of gravity and on a path that is approximately normal to the cutting plane; and

contacting the food products and positioning the food products so that they free-fall on the path at a predetermined location within a cross-section of the feed passage **(14,54,74)** as the food products free-fall through the feed passage **(14,54,74)** and prior to encountering the cutting means **(12,52,72)** so as to produce size-reduced products of substantially consistent size and shape.

Claim 14: A method of cutting food product, the method comprising the steps of:

individually delivering food products to a cutting means **(12,52,72)** comprising at least one cutting element **(34,53,55)** disposed in a cutting plane that is not vertical by causing the food products to free-fall through a feed passage **(14,54,74)** and then free-fall through the cutting means **(12,52,72)** entirely under the force of gravity and on a path that is approximately normal to the cutting plane; and

contacting the food products and positioning the food products with a plurality of resilient members **(36,38,42)** extending radially

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inward into the feed passage (14,54,74) toward a central axis thereof, the resilient members (36,38,42) causing the food products to free-fall on the path at a predetermined location within a cross-section of the feed passage (14,54,74) as the food products free-fall through the feed passage (14,54,74) and prior to encountering the cutting means (12,52,72) so as to produce size-reduced products of substantially consistent size and shape.

As stated at Paragraph [0001] of their specification (all paragraph numbers are in reference to the numbering assigned by the USPTO authoring software), Appellants' invention is directed to a process for cutting food products to reduce the size of the products. As further stated at Paragraphs [0005] and [0006], Appellants' invention is intended to reduce the size of food products to a consistent size and shape through the use of gravity to cause *the products to free-fall entirely through a cutting means* that produces the desired size reduction.

As recited in independent Claim 1, Appellants' claimed process involves the use of a cutting means (12,52,72) that comprises at least one cutting element (34,48,53,55) disposed in a cutting plane that is not vertical. Paragraphs [0007], [0009], [0010], [0015] (first sentence), [0018] (last sentence), [0024] (first sentence), and Figures 1, 8, and 9. Food products are individually delivered to the cutting means (12,52,72) by causing the food products to free-fall through a feed passage (14,54,74), and then causing the food products to free-fall through the cutting means (12,52,72) entirely under

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the force of gravity and on a path that is approximately normal to the cutting plane. Paragraphs [0005] (first sentence), [0014] (first sentence), [0019] (first sentence), [0023] (second to last sentence), and [0024] (second sentence). Appellant's process further involves contacting the food products and positioning the food products so that they free-fall on the path at a predetermined location within a cross-section of the feed passage (14,54,74) as the food products free-fall through the feed passage (14,54,74) and prior to encountering the cutting means (12,52,72) so as to produce size-reduced products of substantially consistent size and shape. Paragraphs [0019] (first two sentences), [0020] (first four sentences), [0021] (fifth sentence), [0022] (last two sentences), and [0024].

Independent Claim 14 also recites Appellants' claimed process as involving individually delivering food products to a cutting means (12,52,72) that comprises at least one cutting element (34,48,53,55) disposed in a cutting plane that is not vertical by causing the food products to free-fall through a feed passage (14,54,74) and then free-fall through the cutting means (12,52,72) entirely under the force of gravity and on a path that is approximately normal to the cutting plane. Support for these limitations can be found in the same paragraphs as those cited for Claim 1. Appellant's process of Claim 14 further requires the use of a plurality of resilient members (36,38,42) to contact the food products and position the food products. The resilient members

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(36,38,42) extend radially inward into the feed passage (14,54,74) toward a central axis thereof, and cause the food products to free-fall on the path at a predetermined location within a cross-section of the feed passage (14,54,74) as the food products free-fall through the feed passage (14,54,74) and prior to encountering the cutting means (12,52,72) so as to produce size-reduced products of substantially consistent size and shape. Paragraphs [0019] (first sentence), [0020] (first four sentences), [0021], [0022], and Figures 1, 2, 3, and 6.

Independent claims 1 and 14 recite a "cutting means," which is in reference to the cutting units 12, 52, and 72 of Figures 1, 8, and 9, respectively. These units 12, 52, and 72 are generally described and/or shown as comprising a housing, such as the housing 26 of Figure 1 that includes a cutting head mounted on a sled 28 as described in Appellants' specification at Paragraph [0015] (first sentence). The units 12, 52 and 72 may include stationary knives (34 in Figure 4), a rotary cutting wheel (48 in Figure 5), or some combination of stationary or rotary cutting element(s) (e.g., 53 and 55 in Figure 8). Paragraphs [0016], [0017], and [0024] (third sentence). As such, Appellants believe that structures corresponding to the "cutting means" are those that include stationary and/or rotary cutting elements, a suitable housing therefor, and other support structures (e.g., the sled 28 of Figure 1).

In summary, Appellants teach and claim a process of reducing the

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size of food products to a consistent size and shape through the use of gravity to cause *products* to free-fall *entirely through* a cutting means that produces the desired size reduction. As evident from the Figures, Appellants' apparatuses do not employ any device that *stops* the food products at or in the vicinity of the cutting elements (e.g., the stationary blades 34 of Figure 4 or rotary cutting wheel 48 of Figure 5), and as such Appellants' process does not entail stopping food products while they are engaged by the cutting elements.

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GROUND OF REJECTION TO BE REVIEWED ON APPEAL

A concise statement of each ground of rejection presented for review follows:

- a) Whether Claims 1, 6, and 7 are patentable over U.S. Patent No. 2,006,643 to Leo applied, under 35 USC §102(b).
- b) Whether Claims 8, 9, 14, 18, and 19 are patentable over the combination of Leo and U.S. Patent No. 2,572,770 to Shadduck, applied under 35 USC §103.

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ARGUMENT

(A) Rejection under 35 USC §102(b) over Leo

Provided immediately below is a discussion of the 35 USC §102 rejection of the claims under appeal, followed by remarks directed to the claims individually or grouped as set forth below. In addressing the §102 rejection, Appellants rely on MPEP §2131, which states:

A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. The identical invention must be shown in as complete detail as is contained in the ...claim. The elements must be arranged as required by the claim, but this is not an ipsissimis verbis test, i.e. identity of terminology is not required. (Citations omitted).

Claims 1, 6, and 7

Leo discloses

an apparatus for slicing or cutting materials such as food stuffs, for example cheese, butter, ground meats in molded form, jelly products and the like.

More specifically, this invention relates to an apparatus for slicing materials which have been either molded in a receptacle, or inserted therein, to produce slices of uniform size and thickness.

Column 1, lines 1-8.

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As described in Leo at page 1, left column, lines 24-40, the material is molded in a tubular receptacle, which is then "placed over the cutting apparatus and as the mass slides out of the receptacle it is sliced into the desired form." The tubular receptacle (20 in the Figures) is described in more detail at page 1, right column, lines 31-55. With the material (jell) within the tubular receptacle 20, the receptacle 20 is placed on an arm 33 of the cutting apparatus (slicing machine), and the material may "drop by gravity into the slicing machine." Leo at page 2, left column, lines 6-12.

The arm 33 of the slicing machine is described as having "recessed grooves in which a thin metallic plate 37 is slidable. . . . The plate 37 has a hole 38 therein which is somewhat larger than the open ends of the receptacle 20 and may be brought into alignment with the receptacle [20]" Leo at page 2, left column, lines 20-29. The arm 33 also has a top plate 40 with grooves that define "a passageway for a knife or plate 42 having a cutting edge." Leo at page 2, left column, lines 30-36. The top plate 40 is mounted on a spacer plate 36 above the grooves in which the plate 37 is slidable. Leo at page 2, left column, lines 22-25. As such, the knife/plate 42 is also above the plate 37, as shown in Figure 4 of Leo. "The plates 37 and 42 are secured to a push rod having a handle 44 at the end thereof for manually actuating the apparatus." Leo at page 2, left column, lines 37-39.

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The slicing operation performed with Leo's apparatus is described as follows:

With the plunger arm 43 in extended position, material within the vertical receptacle 20 falls by gravity or by mechanical force, exerted by the plunger 24, *onto the plate 37*. The plunger arm 43 is *then* forced inwardly by pushing on the handle 44, thereby forcing the knife 42 through the material to cut the slice therefrom, while, at the same time, moving the plate 37 so that the hole 38 therein is brought into alignment with the opening 46 in the top plate.

When the knife edge reaches the position shown in Fig. 3, a slice having the thickness of the spacer plate 36 is disengaged from the knife [42] by the runners 48 and allowed to drop through the hole 38 into a receptacle. The plunger arm [43] is next extended by pulling on the handle 44, thereby again withdrawing the knife 42 from contact with the material in the receptacle 20 and *allowing the material to drop down onto the plate 37*.

Page 2, left column, lines 55-74 (emphasis added).

Finally, Leo discloses that

If it is desired to dice the material being sliced or separate it into parts having any desired shape, a die 50 such as is shown in Fig. 6 may be used. The die 50 may be merely a coarse mesh wire screen 51 or a series of criss-cross knife blades secured to a ring 52 for mounting within the neck 45 of the top plate 40. The material, such as jelly, in the receptacle 20 is *extruded* through the screen [51] *and then sliced* to form cubes or blocks of the desired size.

Page 2, right column, lines 13-23 (emphasis added).

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The explanation for the §102 rejection was that

Leo discloses all the recited steps of the invention including:

...
b) individually delivering food products to the cutting means
by causing the food products to free-fall through a feed
passage (at 20) and then free-fall through the cutting means
entirely under the force of gravity . . . (page 2, left col., lines
56-57 and right col., lines 13-23);
....

Office Action dated June 6, 2005.

In their responses filed April 18 and August 5, 2005, Appellants cited the passage cited above by the Examiner (and included above in Appellants' discussion of Leo's teachings) to argue that Leo does not disclose "causing the food products to . . . free-fall through the cutting means entirely under the force of gravity." Appellants also argued that, without any express teachings to the contrary, Leo's step of extruding the material through the screen 51 would be interpreted as being performed with the same plunger 24 used to force the material within the vertical receptacle 20 onto the plate 37. See Leo at page 2, left column, lines 55-57. Applicants believe such an interpretation is consistent with the ordinary meaning of the word "extrusion," which according to the Examiner means "1. to force, press, or push out or 2. to shape (as metal or plastic) by forcing through a die." Continuation page of the Advisory Action of August 29, 2005 (Paper No. 08222005). Such an interpretation is also

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believed to be consistent with the fact that the knife 42 could not possibly be operated to make horizontal cuts through the material if it were being extruded at the speed of a free-falling material.

In response to the above arguments, the Examiner offered the following response:

Applicants contend that Leo does not teach the material being free-fall [sic] through a cutting means since applicant's interpretation of Leo's extrusion step is to be performed with the plunger 24 to be consistent with the ordinary meaning of the word "extrusion". The examiner respectfully disagrees. According to Merriam-Webster dictionary, "extrude" means 1. to force, press, or push out or 2. to shape (as metal or plastic) by forcing through a die. Leo teaches that the material can fall by gravity or by a plunger onto the plate and can be diced by a die 50. The step of dicing is performed prior to reaching the plate. This clearly teaches that the material can be forced through the die by force of gravity. Such teachings satisfy the limitation "free-fall through the cutting means" set forth in claims 1 and 14.

Advisory Action of August 29, 2005 (Paper No. 08222005).

However, Appellants respectfully believe that the above explanation does not address the affect of the phrase "entirely under the force of gravity," and overlooks the meaning of the word "through." The ordinary meaning of the preposition "through" in the phrase "the food products . . . free-fall through the cutting means" is "in one side and out the other side of." *Webster's New Twentieth Century Dictionary, Unabridged* (Second Edition). As such,

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Appellants' claimed process requires that a *product* itself (not a portion thereof) free-falls *through* the cutting means, and that passage of the product through the cutting means is entirely the result gravity. Such an interpretation is consistent with Appellants' invention as it is described at the third sentence of Paragraph [0019] ("It can be appreciated that the height of the feed tube 14 must be sufficient to enable food products to gain enough vertical velocity to pass completely through the cutting head 30").

In contrast, Appellants believe that, at best, Leo discloses "forc[ing], press[ing], or push[ing] out" a *limited* portion of a material through a screen 51 (using the Examiner's definition of "extrude"). Appellants do not believe that the limitation of "free-fall[ing] through the cutting means" in Claim 1 is within the ordinary meaning of the term "extrude." Even if, for arguments sake, Leo's extruding step were accomplished by dropping the material onto the screen 51, the material does not and cannot "free-fall free-fall *through* the cutting means entirely under the force of gravity" because Leo discloses "material within the vertical receptacle 20 falls by gravity or by mechanical force, exerted by the plunger 24, *onto the plate 37*," which then supports the material to permit horizontal slicing with the knife 42 (Page 2, left column, lines 55-61; see also Figures 3 and 5 of Leo). Therefore, Appellants respectfully believe that Leo does not disclose or suggest causing the material to free-fall *through* the screen 51 *entirely* under the force of gravity, because Leo's plate 37 limits the

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free-fall of any material such that only a limited portion of a product can be extruded through the screen 51 during any given operating cycle of Leo's apparatus, which includes the slicing operation performed by Leo's knife 42.

In view of the above, Appellants respectfully believe that Leo does not anticipate independent Claim 1 or its dependent Claims 6 and 7 under the test for anticipation set forth at MPEP §2131. Appellants therefore respectfully request that this Honorable Board of Appeals reverse the Examiner's rejection under 35 USC §102.

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(B) Rejection under 35 USC §103 over Leo and Shadduck

Provided immediately below is a discussion of the scope and content of the prior art applied in the 35 USC §103 rejection of the claims under appeal, followed by remarks directed to the claims individually or grouped as set forth below.

Appellants respectfully traverse the 35 USC §103 rejection for the reason that their invention is an unobvious improvement over the prior art when evaluated under the criteria established by the Supreme Court in *Graham v. John Deere*, 148 U.S.P.Q. 459 (1966).

Claims 8, 9, 14, 18, and 19

Claims 8, 9, 14, 18, and 19 differ in part from Claims 1, 6, and 7 rejected under 35 USC §102 on the basis of further requiring that the food products are contacted and positioned with a plurality of resilient members (36,38,42) that extend radially inward into the feed passage (14,54,74) toward a central axis thereof, and cause the food products to free-fall on the path at a predetermined location within a cross-section of the feed passage (14,54,74) prior to encountering the cutting means (12,52,72).

As summarized under Appellant's arguments directed to the 35 USC §102 rejection, Leo does not disclose or suggest causing a material to free-fall

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entirely under the force of gravity *through* a cutting means (Leo's screen 51 or knife 42). Instead, Leo's plate 37 limits the free-fall of any material such that only a limited portion of a product can be extruded through the screen 51 during any given operating cycle of Leo's apparatus.

Shadduck discloses a vegetable splitter that uses a plunger 17 to force a food product 19 through a knife assembly 21. Shadduck at Column 2, Lines 42-48. Shadduck was applied by the Examiner for its disclosure of "a plurality of uniformly distributed resilient members (36) extending radially into the feed passage for centering the food products." Office Action of June 6, 2005. Appellants acknowledge Shadduck's disclosure of "downwardly and inwardly sloping tongues 36 that serve to center the potato 19 as it is dropped into position and before the plunger 17 has had an opportunity to apply its arcuate or hollow curvature 18 toward this purpose." Shadduck at Column 3, Lines 23-27.

However, Appellants respectfully believe that Shadduck does not provide any motivation to modify Leo's apparatus by adding Shadduck's sloping tongues 36 to center the material being diced by Leo's screen 51 or sliced by Leo's knife 42, as there doesn't appear to be any purpose or benefit to such a modification. Though the Examiner's explanation for modifying Leo with Shadduck was "to center the food products within a casing having a cross section size larger than a cross section size of the food products so as to

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produce substantially uniform sized pieces,” it appears that substantially uniform sized pieces of Leo’s material would be produced regardless of where the material is within Leo’s tubular receptacle 20, on the screen 51 during extrusion, or on the plate 37 during slicing by the knife 42. It appears particularly irrelevant to center Leo’s material during the operation of Leo’s apparatus since Leo teaches that the apparatus as disclosed is already capable of producing “slices of uniform size and thickness.” See Leo at Page 1, Left Column, Lines 5-8.

Finally, as with Leo, Shadduck does not teach or suggest a process by which a material is caused to free-fall *entirely* under the force of gravity *through* a cutting means. Instead, both Leo and Shadduck teach applying a force to a material to *extrude* the material through a die (Leo) or knife assembly (Shadduck). Therefore, in combination, Appellants respectfully believe that Leo and Shadduck do not teach or suggest Appellants’ claimed process that includes a step in which “resilient members caus[e] the food products to free-fall on the path at a predetermined location within a cross-section of the feed passage as the food products free-fall through the feed passage and prior to encountering the cutting means,” where “the food products [are caused] to . . . free-fall through the cutting means entirely under the force of gravity . . .”. Finally, Appellants wish to note that, while one could attempt to carry out Appellants’ method with an apparatus of the type disclosed

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by Leo or Shadduck, such an argument would be based on an "obvious to try" argument that "is not a legitimate test of patentability." *In re Fine*, 5 USPQ2nd 1596, 1599 (Fed. Cir. 1987); citing *In re Geiger*, 2 USPQ2nd 1276, 1278 (Fed. Cir. 1987), and *In re Goodwin*, 198 USPQ 1, 3 (CCPA 1978).

For all of the above reasons, Appellants believe that the combined teachings of Leo and Shadduck fail to teach or even suggest Appellants' claimed invention recited in independent Claim 14, its dependent Claims 18 and 19, or dependent Claims 8 and 9 (which depend from Claim 1). Appellants therefore respectfully request that this Honorable Board of Appeals reverse the Examiner's rejection under 35 USC §103.


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CLOSING

For all of the reasons set forth above, Appellants respectfully request that this Honorable Board of Appeals reverse the Examiner's rejections of claims 1, 6-9, 14, 18, and 19 under 35 USC §§102 and 103.

Respectfully submitted,

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Attachments: Claims Appendix; Evidence Appendix; Related Proceedings Appendix

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CLAIM APPENDIX

Claim 1: A method of cutting food product, the method comprising
the steps of:

providing a cutting means comprising at least one cutting element
disposed in a cutting plane that is not vertical;

individually delivering food products to the cutting means by causing
the food products to free-fall through a feed passage and then free-fall through
the cutting means entirely under the force of gravity and on a path that is
approximately normal to the cutting plane; and

contacting the food products and positioning the food products so that
they free-fall on the path at a predetermined location within a cross-section of
the feed passage as the food products free-fall through the feed passage and
prior to encountering the cutting means so as to produce size-reduced products
of substantially consistent size and shape.

Claims 2-5: (Withdrawn)

Claim 6: The method according to claim 1, wherein the contacting
and positioning step comprises contacting only the outer peripheries of the food
products as the food products free-fall through the feed passage.

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Claim 7: The method according to claim 1, wherein the feed passage and the path therein are oriented substantially vertically so that the food products free-fall substantially vertically.

Claim 8: The method according to claim 1, wherein the contacting and positioning step comprises contacting and positioning the food products with a plurality of resilient members extending radially inward into the feed passage toward a central axis thereof.

Claim 9: The method according to claim 8, wherein the resilient members are uniformly distributed along an inner perimeter of the feed passage so as to center the food products passing therethrough at the central axis of the feed passage.

Claims 10-13: (Withdrawn)

Claim 14: A method of cutting food product, the method comprising the steps of:

individually delivering food products to a cutting means comprising at least one cutting element disposed in a cutting plane that is not vertical by causing the food products to free-fall through a feed passage and then free-fall through the cutting means entirely under the force of gravity and on a path that

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is approximately normal to the cutting plane; and

contacting the food products and positioning the food products with a plurality of resilient members extending radially inward into the feed passage toward a central axis thereof, the resilient members causing the food products to free-fall on the path at a predetermined location within a cross-section of the feed passage as the food products free-fall through the feed passage and prior to encountering the cutting means so as to produce size-reduced products of substantially consistent size and shape.

Claims 15-17: (Withdrawn)

Claim 18: The method according to claim 14, wherein only the outer peripheries of the food products are contacted as the food products free-fall through the feed passage.

Claim 19: The method according to claim 14, wherein the feed passage and the path therein are oriented substantially vertically and the contacting and positioning step comprises centering the food products at a central axis of the feed passage.

Claim 20 (Withdrawn)

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Evidence Appendix

None.

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Related Proceedings Appendix

None.